UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Distrigas of Massachusetts LLC — Docket No. RP06-467-000

ORDER ACCEPTING PROPOSED TARIFF REVISIONS,
SUBJECT TO CONDITIONS

(Issued September 1, 2006)

1. On August 4, 2006, Distrigas of Massachusetts LLC (DOMAC) filed revised tariff sheets[1] to enable the collection of any Call Payment due following suspension of service for non-payment. The proposed revisions are accepted, subject to conditions, to be effective September 4, 2006, as requested.

Background

2. DOMAC's tariff[2] permits it to negotiate Call Payments or prepayments with firm purchasers of liquefied natural gas (LNG). The Call Payment is subject to a price cap equal to the sum of the firm transportation demand charges on a number of pipelines.

3. On July 5, 2006,[3] the Commission accepted, subject to refund and conditions, DOMAC's revised billing and payment procedures, and new credit standards applicable to its sales services. The Commission found in the July 5 Order that DOMAC's tariff did not include specific language relating to the Call Payment specifying the charges it

[1] Sixth Revised Sheet No. 40 and Second Revised Sheet No. 48H to FERC gas Tariff, First Revised Volume No. 1.

[2] *See* §3.1 in each of DOMAC's firm rate schedules: Rate Schedule FCSS – Firm Combination Sales Service, Rate Schedule FLSS – Firm Liquid Sales Service, and Rate Schedule FVSS – Firm Vapor Sales Service..

[3] *Distrigas of Massachusetts LLC*, 116 FERC ¶ 61,007 (2006) (July 5 Order).

proposed to collect during periods of suspension.[4] The Commission found that until DOMAC makes a section 4 filing under the Natural Gas Act,[5] it does not have authority to collect such charges during periods of suspension.

Details

4. DOMAC proposes to revise the sections of its tariff relating to billing and payment/suspension and termination of service for non-payment (section 6.4) and credit evaluation/loss of creditworthiness (section 17.3.6) to state that "[s]uspension of service hereunder shall be without prejudice to Seller's right to collect any unpaid portion of the Call Payment to which it is entitled."[6] DOMAC states that it believes that it is currently permitted to collect Call Payments during periods of suspension, but that it makes the instant filing to "provide expressly" that suspension of service in the event of buyer default or loss of creditworthiness would not relieve the buyer of any then-existing obligation to make scheduled Call Payments.[7]

5. DOMAC contends that because its tariff provides complete flexibility to structure the manner of a Call Payment, such payments should be unaffected by a buyer-induced suspension of service. DOMAC explains that since each of its firm rate schedules and the pro forma service agreement for Firm Vapor Sales Service contains Call Payment provisions in an amount to be negotiated, DOMAC and a buyer may make the Call Payment in a single lump sum or spread the payment over several installments throughout the term of the service agreement. DOMAC argues that if it is entitled to collect the entire payment at the outset of the term of the service agreement, it should not be precluded from collecting all, or any portion, of the negotiated Call Payment at any other point in time, even if a buyer's default or loss of creditworthiness results in suspension of service for some period to that buyer.

6. DOMAC argues that good cause exists for collecting the Call Payment during periods of suspension, and that its Call Payment is different from a reservation charge paid by a shipper on a interstate pipeline. The Call Payment is different, argues DOMAC, because the Call Payment is an agreed-upon payment for a commodity that

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[4] *Id.* at P 21.

[5] 15 U.S.C. § 717c (2000).

[6] Proposed Sixth Revised Sheet No. 40 and Second Revised Sheet No. 48H. The Call Payment provision compensates DOMAC for operating its LNG terminal and purchasing LNG supply.

[7] DOMAC Transmittal Letter at 2.

does not correspond to a particular billing cycle and does not serve as a “reservation” fee entitling the buyer to “capacity” in DOMAC‘s terminal. DOMAC contends that the Call Payment not only compensates it for fixed costs to operate the terminal, but also for costs of arranging and purchasing LNG supply and for other aspects of performing under its sales service agreements. DOMAC further contends that if it suspends service, it may not be able to resell at the full contract price on an interruptible basis and would have no opportunity to recover “lost” Call Payment amounts for gas already delivered.

7. DOMAC asserts that recovering the Call Payment during periods of suspension prevents buyers from engaging in opportunistic behavior. DOMAC contends that the only way to prevent gaming on its system when market prices fall below the buyer’s service agreement is to deny relief from the Call Payment(s) owed during the suspension period. DOMAC argues that even though the Call Payment amount is fully negotiable and varies among customers, the Call Payment is a fixed obligation of the buyer under each service agreement at the time of execution of the service agreement. DOMAC contends that if the Commission does not permit the collection of any portion of the Call Payment that would otherwise be due during periods of suspension, then, to protect itself, DOMAC may collect the entire Call Payment at the outset of each of its service agreements, which DOMAC asserts would not be in the best interest of its buyers.

8. DOMAC explains that it does not intend to collect any commodity charges during periods in which it has suspended service to a buyer, other than charges that apply to natural gas or LNG delivered to the buyer prior to the suspension and for which the buyer has not made payment. DOMAC further explains that since it will not make deliveries to a buyer during the period of suspension, no commodity charge will be incurred by the buyer, therefore, DOMAC believes that no clarification is necessary with respect to commodity charges during periods of suspension.

Notice

9. Notice of DOMAC’s filing was issued on August 9, 2006, with interventions and protests due as provided in section 154.210 of the Commission’s regulations, 18 C.F.R. § 154.210 (2006). Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), all timely motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

Discussion

10. The Commission will permit DOMAC to charge the Call Payment during shipper suspensions as it has proposed, conditioned on DOMAC limiting the period of any suspension to two months.

11. The Commission has allowed pipelines two methods of responding to material breaches of contracts by shippers, including situations in which the shipper's credit status has deteriorated and the shipper has not been able to provide the requisite collateral required by the pipeline's tariff. In such a situation, the pipeline can seek to terminate service to the shipper with at least 30 days notice to the Commission.[8] Such termination is akin to abandonment of service.[9] The pipeline also can suspend the shipper's service on shorter notice. Suspension is distinct from termination, because under suspension, the shipper maintains its contractual right to firm service after the circumstances causing the suspension are lifted and the pipeline will resume service to the shipper once the circumstances causing the suspension have been resolved. As the Commission explained in its *Policy Statement on Creditworthiness*:

> The Commission allows pipelines to suspend service on shorter notice than termination, since it allows the pipeline to protect itself against potential losses arising from the continuation of service to a non-creditworthy shipper, such as the incurrence of large imbalances that may be extinguished in bankruptcy. Pipelines that suspend service are making an election of remedies: they are determining that that the risks of continued service outweigh the potential collection of reservation or other charges during the time of the suspension.[10]

12. The Commission generally has not permitted pipelines providing transportation service to continue to assess a full reservation charge for firm service during the period of suspension, because this is a remedy that the pipeline can elect and the pipeline should not be able to charge for service during the time period that the pipeline is refusing to

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[8] 18 C.F.R. § 154.602.

[9] *Policy on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, Regulations Preamble, FERC Stats. & Regs. ¶ 31,191 at P 22-25 (2005) (Policy Statement on Creditworthiness); *Northern Natural Gas Co.*, 103 FERC ¶ 61,276, at P 51 (2003)

[10] FERC Stats. & Regs. ¶ 31,191 at P 24.

perform its obligation to provide service.[11] While the Commission has not permitted a pipeline to recover its full reservation charge for firm service, it has recognized that a portion of this charge may represent a charge for holding the capacity available for the shipper.[12] The Commission explained:

> The Commission recognizes that when a pipeline suspends a firm shipper's contract, it is still providing some value to the shipper by reserving the capacity for the shipper's use. Pipelines may propose some lesser charge to reflect the value of reserving the capacity for a short period of time. Such a filing, however, must address the shipper's ability to release capacity or otherwise share in the pipeline's generation of revenue from the use of the capacity for which the shipper is paying.[13]

13. We find that DOMAC has shown that it should be permitted to charge for Call Payments during suspension, because the Call Payments represent a cost of reserving gas for shippers. In this regard, DOMAC is very different from the typical interstate pipeline. DOMAC is the owner and operator of a LNG import and regasification facility. As well, it markets LNG in both liquid and vapor (regasified) form throughout the northeastern United States. DOMAC provides liquid, vapor, or combination sales services on a firm or interruptible basis. DOMAC's customers include local gas distribution companies (LDCs), electric generating facilities, natural gas marketers, and industrial end-users. These customers may contract for service for daily, weekly, seasonal, annual, or multi-year periods. DOMAC does not use its facilities to provide open access transportation services, and therefore it does not offer storage or terminalling services to LNG shippers or importers, including its own affiliates.

14. The Call Payment is paid by firm customers who are reserving the right to buy LNG from DOMAC. These customers then pay the cost of the gas purchased from DOMAC. DOMAC explains that Call Payments entitle customers to firm sales service. Replacing a firm sales customer, according to DOMAC, would be difficult if that customer's service is suspended. This is in contrast to a reservation charge for transportation, which reserves capacity and can be more easily resold. Thus, unlike the

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[11] *See Policy Statement on Creditworthiness*, FERC Stats. & Regs. ¶ 31,191 at P 24; *Tennessee Gas Pipeline Co.*, 105 FERC ¶ 61,120 at P 11-12 (2003), *aff'd, Tennessee Gas Pipeline Co. v. FERC,* 400 F.3d 23 (D.C. Cir. 2005).

[12] *Policy on Creditworthiness* FERC Stats. & Regs. ¶ 31,191 at P 25.

[13] *Id*.

reservation charge for firm service on a typical pipeline, which "encompasses charges for both reservation and transportation services,"[14] the Call Payment is a charge for holding gas available for customers, for which the customer would pay separately. As DOMAC explains, unlike a reservation charge for transportation, which the pipeline can resell as interruptible transportation during the period of suspension, DOMAC must stand ready during suspension to provide the required gas to the customer whenever the customer has cured its credit problem and is again eligible for service.

15. While DOMAC will be permitted to charge for Call Payments during suspension, the Commission will condition its acceptance of DOMAC's filing on its revising its tariff to limit suspension to a period of no more than two months, without agreement by the shipper to extend that period, or an order by the Commission extending the suspension. As explained above, the Commission has permitted the pipeline to suspend service on shorter notice than termination of service to allow the pipeline to protect itself against potential losses that could be incurred during the period the pipeline is seeking Commission approval for termination. But suspension was never intended to provide the pipeline with the right to unilaterally cease service for an extended period of time, and continue to charge for even a portion of that service, without Commission review of the propriety of the pipeline's action.[15] Permitting such an extended period of suspension would be akin to permitting the pipeline to unilaterally abandon service.

16. Permitting DOMAC to suspend service, and to charge the Call Payment for a two-month period, provides a reasonable balance between the pipeline's need to protect against enhanced losses and the shipper's right to protection against being charged for a service that it cannot receive. The two month period will give DOMAC and the shipper an opportunity to resolve their differences while still giving DOMAC sufficient time to file with the Commission to terminate the shipper's service, so that the Commission can have an opportunity to assess the proposed termination. The shipper and DOMAC will have the ability to reach an agreement on such an extension of the suspension period if they agree more time is necessary for the shipper to resolve its credit problems.

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[14] *Tennessee,* 400 F.3d at 26.

[15] In fact, should the pipeline seek to terminate the shipper's contract, it would no longer be permitted to collect Call Payments. *Tennessee*, 400 F.3d at 26-27. There is no reason that DOMAC should be able to convert a suspension into a de facto termination by suspending a shipper for an extended period of time, simply to continue to collect Call Payments. Two month's suspension satisfies the rationale for permitting suspension while not converting this short-term remedy into the equivalent of termination and service abandonment.

17. The limitation on suspension and collection of the Call Payments to two months, however, does not affect DOMAC's rights to seek an appropriate remedy for a material contractual breach. As the Commission explained in *Tennessee,* should DOMAC seek to terminate service after the suspension period, it will retain the full right to bring an action in the appropriate forum for consequential, and unmitigated damages occasioned by a shipper's contractual breach, which would include damages from failing to make all Call Payments required under the contractual terms of its contract.[16]

18. DOMAC maintains that refusing to permit it to recover Call Payments during periods of suspension will create disparities between shippers that negotiate to pay the Call Payment in full at the start of the year and those that opt to pay the Call Payment monthly. The Commission's action here does not create undue discrimination between these two classes of shippers. DOMAC is permitted to charge for Call Payments during the two-month suspension period and the same suspension period will apply to both classes of customers. The Commission is treating the suspension of service equally for both classes of customers, those shippers paying once a year and those paying monthly. As discussed above, should DOMAC terminate service for a material breach of contract, DOMAC will be entitled to seek an appropriate remedy for a material contractual breach, which would include all Call Payments required under the terms of its contract.

19. DOMAC also argues that refusing to allow it to recover the Call Payment during times of suspension will prevent buyers from engaging in opportunistic behavior by, for example, choosing to default simply to avoid its scheduled Call Payment when market prices fall below the price set forth in its service agreement simply to resume service when prices change. The Commission finds that its action here does not permit such opportunistic behavior. First, the Commission is permitting DOMAC to recover Call Payments during times of suspension. Second, DOMAC incorrectly presumes that shippers can create suspensions of service. But DOMAC, not the shipper, controls whether to suspend service and seek termination of contract for breach.[17] If a shipper does default, as in DOMAC's example, DOMAC can continue to insist on payment without suspending or terminating the contract, or can suspend and receive two months of

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[16] *Tennessee Gas Pipeline Co.*, 103 FERC ¶ 61,275 at P 84-85 n. 69 (2003). As the Commission explained, a pipeline has a choice of two mutually exclusive options on breach: it may elect to terminate the contract and collect damages for breach or may continue to treat the contract as valid and await the designated time for performance to bring suit.

[17] *See Tennessee, 400 F.3d at 27* ("pipeline, in light of available remedies, retains full control of the shipper's obligation to pay").

Call Payments, preparatory to terminating the contract. Should DOMAC terminate the contract, the shipper would have no right to resume service when prices change, as DOMAC incorrectly presumes.

The Commission orders:

The Commission accepts DOMAC's revised tariff sheets, to be effective September 4, 2006, as requested, subject to DOMAC filing revised tariff sheets consistent with the conditions described in the order within 30 days of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.